IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED
MAY 10 2007
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE, Plaintiff,	§	
vs.	§	NO. 2:07cv170
KENYA WHITAKER Defendant.	§	

DEFENDANT KENYA WHITAKER'S MOTION TO TRANSFER
OR TO STAY THE PROCEEDINGS AND BRIEF IN SUPPORT

Defendant Kenya Whitaker files this Motion to Dismiss, Transfer, or to Stay this action, and would respectfully show the Court as follows:

1. Whitaker was a franchisee under a franchise agreement with plaintiff JTH Tax Inc. /Liberty (hereinafter "Liberty) until that obligation was transferred to an independent entity, Easy Software Solutions, LLC ("ESS"), a Texas Limited Liability Company. After Liberty breached the agreement with ESS, it was terminated. Whitaker is a guarantor of certain obligations under the agreement.

2. Liberty has sued Whitaker – but not ESS – in this action, alleging breach of the franchise agreement. Whitaker is requesting transfer of this action to the United State District Court for the Northern District of Texas, where it can be consolidated with another action already pending between *all* those parties necessary to this dispute – Liberty, Whitaker, *and* ESS – thus allowing for the resolution of all actions and disputes between these parties at the locus of the events where the conduct about which Liberty – and ESS – complains occurred and where all witnesses reside.

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Factual Background

3. In July 2003, Liberty and Whitaker entered into a franchise agreement, a copy of which is attached as Exhibit A. On August 14, 2003, ESS became the franchisee under the agreement and Whitaker remained liable only as a guarantor. Exhibit B.

4. Under the agreement, Liberty promised to provide "special marketing techniques and operating procedures to facilitate the provision of tax return preparation and related services." Exhibit A at 3. It also promised to provide or recommend a source for tax return preparation software as well as support for franchisee's preparation and use of such tax preparation software. *Id.* at 5, 6. In addition, Liberty promised to provide the ability to electronically file tax returns, a refund application loan program, advanced training, aid in obtaining needed supplies, and financing to franchisees. *Id.* at 6.

5. In fact, however, Liberty did not fully perform on its obligations under the agreement and ESS found that the software it was required to use actually hampered its business efforts rather than promoted them. For instance, in January, 2004, ESS began operations as a Liberty franchisee with a projection to file 800 individual tax returns. This projection was based on the understanding that Liberty would provide the promised corporate advertising support in the area of five percent (5%) of the marketing budget.

6. That support never materialized. Instead, it was ESS that spent significant amounts on marketing for sporting event promotions, radio advertisements, coupon distribution, parades, etc. in its attempt to generate additional business. Liberty never approved or provided any radio or television advertisements or other significant marketing support; indeed Liberty's "marketing support" consisted of taking out an ad in the Yellow Pages.

7. Indeed, Liberty actually undermined ESS's efforts by allowing *another* Liberty franchisee to prepare *free* returns in ESS's designated area. Despite bringing this problem to Liberty's attention, nothing was done to stop the marketing within the ESS territory until ESS threatened to sue for breach of contract for not supporting ESS as its franchisee.

8. In addition, in February 2004, Liberty began "intercepting" revenues destined for ESS. After much wrangling, Liberty finally told ESS that it had withheld sums due ESS and applied them toward a promissory note Liberty had encouraged ESS to sign for the balance of its franchise fee. Thereafter, ESS paid off that promissory note to avoid any further "fee intercepts."

9. And when ESS tried to expand and raise the stature and visibility of Liberty's business in the North Texas market, Liberty undermined those efforts. For instance, in July 2004, an ESS principal, R. Byron Whitaker, initiated conversations with Hunt Sports Group and the Dallas Burn regarding the possibility that Liberty would purchase the naming rights to the new MLS soccer stadium in Frisco, Texas, as well as their interest in investing in the development of Liberty franchises within the DFW Metroplex. His efforts soon bore fruit.

10. In August 2004, members from the Hunt Sports Group attended a Liberty Tax Service Open House for those interested in becoming franchisees. Soon thereafter, a meeting and presentation *personally hosted by Lamar Hunt* was arranged for Liberty representatives regarding the naming of the Frisco development for Liberty, as well as the plans by the Hunt Sports Group to invest in Liberty Tax Service as area developers for the DFW Metroplex. The presentation included a mock-up of the proposed center, presentation materials and an engraved pen for each of the attendees.

11. However, instead of capitalizing on the incredible opportunity created by ESS, the Liberty representatives shamed and embarrassed the ESS principals in attendance. During the

meeting, Liberty official John Hewitt commented that the Hunt Sports Group audience "was not his target market" and that money 'was made off of the poor." Mr. Hewitt left the meeting without even shaking anyone's hand or thanking them for the time and effort put into the presentation – and simply abandoned all of the materials prepared for him. The fallout from the actions of the Liberty representatives crippled ESS's ability to develop future business with the Hunt entities.

12. Following this fiasco, in September 2004 Liberty contacted ESS to urge ESS to expand and purchase additional territory in the DFW Metroplex. ESS declined that offer. Soon thereafter Liberty made a written offer for ESS to become its "area developer" for the DFW Metroplex; again the offer was declined. Having once been burned, ESS was in no mood to now try and augment its relationship with Liberty.

13. Still, ESS continued to perform under its franchise agreement. Over the next two tax seasons (2005 and 2006), ESS prepared approximately 670 and 700 returns, respectively.

14. Then, in September 2006, Liberty announced that ESS would be required to use a new "LibTax" software for the upcoming 2007 tax season. Moreover, Liberty announced it would no longer pay for even the yellow pages advertising as it had in previous years. But Liberty continued to require payment by ESS of the same percentage per return.

15. In October 2006, Liberty sent the new LibTax software for use on ESS's computers and offered a group training session for the new LibTax software. Significant problems with the new software required ESS to repeatedly seek technical support from Liberty, and again support was either slow or not forthcoming.

16. In January 2007, a Liberty representative visited the ESS office unannounced to perform an "operational review." Despite the surprise nature of the visit, no issues with the front or back office or marketing materials were noted.

17. The problems with the new LibTax software continued into the 2007 tax season, crippling ESS's revenues. ESS had to notify Liberty of problems with validation errors when processing Pay Stub Loans, "bank reject errors" that arose using the software, various "unknown errors" which popped up when returns were loaded, and timeliness issues with a customer's excise tax credits when using LibTax – a problem that resulted in the customer choosing to have their return prepared elsewhere and attendant loss of revenue and future business. Responses from Liberty showed that it was receiving similar complaints at its national office regarding the new LibTax software.

18. In February, 2007, a second unannounced review of the ESS offices was conducted by Liberty. The Liberty agent, Geoff Knapp, was overtly hostile and unprofessional as he demanded to see individual files of tax returns. When Ms. Whitaker refused to disclose that information based on Knapp's threatening manner and the absence of her business partner, Knapp left – all the while demanding that Ms. Whitaker show him the files or the franchise agreement would be terminated. Indeed, Knapp was so unprofessional and threatening that an ESS customer – taken aback by Knapp's actions – asked if Ms. Whitaker was all right after the harassment she had received from Knapp. Ultimately, the customer left ESS without even completing his purpose for coming into the office.

19. When Knapp later called the ESS office and again demanded that Ms. Whitaker show him the files, he was told that his loud and disrespectful mannerisms in front of the ESS tax preparers and customers would not be tolerated, but that Ms. Whitaker would arrange a meeting with him once her business partner was available to attend.

20. When Liberty's representative from its national headquarters later called, Ms. Whitaker repeated her unwillingness to allow Mr. Knapp to abuse her and her tax preparers, but that the files would be available to anyone who was civil and professional during their visit.

21. Indeed, the second principal of ESS, R. Byron Whitaker, even followed up with an email invitation to Knapp asking to schedule a meeting to resolve the issues created by Knapp's actions. ESS received no response to this entreaty from either Knapp or Liberty's corporate headquarters.

22. Instead, ESS received a letter from Liberty terminating its franchise agreement. ESS accepted that termination in writing, sent Liberty a cashier's check for payment of all outstanding amounts due to Liberty, and returned to Liberty all its files via overnight delivery.

23. Rather than that being the end, Liberty has chosen instead to continue its harassment of Ms. Whitaker and ESS. Indeed, Liberty has directly interfered with ESS's business; an ESS customer has actually told ESS that Liberty Tax Service contacted her and told her that she should not do business with R. Byron Whitaker or his office.

24. Finally, in April 2007, Liberty sued Ms. Whitaker, individually, in this action for breach of the franchise agreement which she is **not** a party to, as well as an alleged violation of Liberty's trademark based on the actions of an ESS preparer – **not** Ms. Whitaker.

25. Based on Liberty's material breaches of the franchise agreement, ESS was relieved of performing under that agreement. Furthermore, ESS has completely paid off any and all amounts owed Liberty.

26. However, because the locus of this dispute and the relevant factors under 28 U.S.C. § 1404 direct the relief requested herein, ESS and Whitaker have filed a declaratory judgment action in the Northern District of Texas and ask that this Court transfer the instant action to Texas.

Argument:
This action should be transferred to the Northern District of Texas.

27. Whitaker requests this Court transfer this case to the Northern District of Texas for consolidation and resolution with the action already on file in that court, one which includes all necessary parties: Liberty, Whitaker, *and* ESS.

A. **The forum selection clause in the franchise agreement is not dispositive.**

28. The franchise agreement contains a provision whereby all Liberty franchisees submit to personal jurisdiction and venue for all actions there under in this district. While a factor for consideration, that provision does not control the determination here.

29. In *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S.Ct. 2239, 2244, (1988), the Supreme found that the balancing prescribed under the federal venue transfer statute, 28 U.S.C. § 1404(a) "encompasses consideration of the parties' private expression of their venue preferences." As this Court has recognized, *Stewart* "requires a federal court to balance the conveniences of the parties and witnesses pursuant to 28 U.S.C. § 1404(a) even though a forum selection clause is present.[1] And as this Court more recently noted: "[R]elying on *Stewart* ... courts within this circuit have held that the propriety of venue rests only upon whether an action satisfies the federal venue statutes, not upon the provisions of the litigants' private contractual agreements."[2] Thus, the forum selection clause is not controlling and an examination of the section 1404 factors is required.

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1 *Venners v. Kimball International, Inc.*, 749 F. Supp. 714, 714-25 (E.D.Va. 1990).

2 *See BHP International Investment, Inc. v. Online Exchange, Inc.*, 105 F.Supp.2d 493, 497 (E.D.Va. 2000), citing *Mead v. Future Medicine Publishing, Inc.*, No. 1:98cv00554, 1999 WL 1939256, at *2 (M.D.N.C.); *Knight Medical, Inc. v. Nihon Kohden America, Inc.*, 765 F.Supp. 291, 292 (M.D.N.C. 1991) (holding that forum-selection clause does not "in and of itself" make venue improper); *Southern Distributing Co., Inc. v. E & J Gallo Winery*, 718 F.Supp. 1264, 1267 (W.D.N.C. 1989); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 (3rd Cir. 1995); *National Micrographics Systems, Inc. v. Canon U.S.A., Inc.*, 825 F.Supp. 671, 678-79 (D.N.J. 1993).

B. Application of the federal venue transfer statute favors sending this action to the Northern District of Texas.

30. 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In applying the statute, a court "must make two inquiries: (1) whether the claims might have been brought in the transferee forum; and (2) whether the interest of justice and convenience of the parties and witnesses justify transfer to that forum."[3] Here, the answer to both questions is yes.

1. Venue and jurisdiction are proper in the transferee forum: Texas.

31. As an initial matter, it is clear that "the proposed transferee court is one in which the action originally may have been brought."[4] Liberty could have brought the present action in the United States District Court for the Northern District of Texas. Both Kenya Whitaker (an individual citizen and resident of the Northern District of Texas), and ESS (a Texas Limited Liability Company) would be subject to jurisdiction in Texas. On the other hand, Kenya Whitaker has no significant contacts with the Eastern District of Virginia, nor does ESS have any offices, employees, or facilities here.

32. Venue would also have been proper over any of Liberty's claims in the Northern District of Texas; all of the alleged breaches or violations of trademark laws occurred within the Northern District of Texas and all witnesses and important documents regarding plaintiff's claims also lie there. Thus, the instant action could have been brought in the Northern District of Texas. Accordingly, the instant action meets the initial eligibility criteria for transfer set forth in 28 U.S.C. § 1404(a).

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3 *Koh v. Microtek Int' l, Inc.*, 250 F.Supp.2d 627, 630 (E.D.Va. 2003).

4 *BHP Int'l Inv., Inc. v. OnLine Exchange, Inc.*, 105 F.Supp.2d 493, 498 (E.D.Va. 2000); *Blackhawk Indus., Inc. v. Bonis*, 238 F.Supp.2d 748, 749 (E.D.Va. 2003).

2. **The balance of the section 1404 factors favors Texas.**

33. In deciding whether to grant transfer pursuant to § 1404(a), a court must consider "the following four factors: (1) the plaintiff's [initial] choice of venue; (2) witness convenience and access; (3) the convenience of the parties; and (4) the interest of justice."[5]

a. **The plaintiff's initial choice of venue.**

34. While "[t]he initial choice of forum, from among those possible under the law, is a privilege given to the plaintiff," it is *not* controlling where "that the balance of convenience among the parties and witnesses is strongly in favor of the forum to which transfer is sought."[6]

35. Nor is this a case where the plaintiff's choice of venue garners holds any unique importance for the trial or resolution of its claims. There are no allegations of any significant contacts with this district important to Liberty's claims; no allegations regarding any dispute or conduct during the negotiations for the purchase of the franchise; no dispute regarding any meetings or conversations with Liberty personnel conducted at its office. Any information or evidence likely to be associated with this district is almost entirely of a documentary nature, and those documents can easily be shipped to Texas where the actual witnesses who will testify in the resolution of these disputes are located.

b. **Witness convenience and access.**

36. Witness convenience and access "is often the most important in balancing for a potential § 1404(a) transfer".[7] "Inconvenience to a witness whose testimony is cumulative is not

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5 *Precision Franchising, LLC v. Coombs,* No. 1:06CV1148, 2006 WL 3840334, at *2 (E.D.Va.); *Corry v. CFM Majestic Inc.*, 16 F.Supp.2d 660, 666 (E.D.Va. 1998).

6 *Koh v. Microtek Int'l, Inc.*, 250 F.Supp.2d 627, 633 (E.D.Va. 2003), quoting *Medicenters of America, Inc. v. T & V Realty & Equip. Corp.*, 371 F.Supp. 1180, 1184 (E.D.Va. 1974)); *see also Beam Laser Sys., Inc. v. Cox Communications, Inc.*, 117 F.Supp.2d 515, 519 (E.D.Va. 2000).

7 *Precision Franchising, LLC,* 2006 WL 3840334, at *5 (E.D.Va. Dec. 27, 2006); *Board of Trustees v. Baylor Heating & Air Conditioning, Inc.*, 702 F.Supp. 1253, 1258 (E.D.Va. 1988)

entitled to greater weight. By contrast, greater weight should be accorded inconvenience to witnesses whose testimony is central to a claim and whose credibility is also likely to be an important issue."[8] Here, the balance of witness inconvenience strongly weighs in favor of transfer.

37. While Liberty's corporate headquarters and principal place of business are located in this district, none of Liberty's employees who may be relevant witnesses at trial work or reside here. While Liberty included the affidavit of Rebecca Ross with its complaint, that affidavit shows she merely performed internet searches for information included with the complaint – an action not restricted to this district. And all the other witnesses from whom Liberty has submitted affidavit support for the claims in the complaint are ***not*** residents of, or even located in, this district. Cory Hughes' affidavit recites he is an Assistant Regional Director for Liberty in Kansas City, Missouri, and his affidavit merely recites that Liberty mailed a termination letter to Whitaker along with generic allegations regarding the terms of the original agreement – again nothing tied to this district. Geoff Knapp's affidavit shows he is the Area Developer for Liberty for an area which includes Texas, and notes that his testimony will be based in large part on his personal visits to the ESS office *in Texas*. Finally, the affidavit of Chet Engstrom, the investigator Liberty sent to try and develop an action against Ms. Whitaker, explicitly notes that he works for a North Texas "investigative service." Thus none of the witnesses whose affidavits support Liberty's claims hold any particular tie to this district, while the only situs for any alleged liability-incurring event is in Texas.

38. On the other hand, several witnesses important to the resolution of the disputes between Liberty, Ms. Whitaker, and ESS – including several not associated with the parties hereto – reside in the Northern District of Texas and would presumably be inconvenienced by having to travel to Virginia so that their testimony could be observed first hand by a jury.

(stating that "witness convenience is often dispositive in transfer decisions").

8 *Board of Trustees,* 702 F.Supp. at 1258.

39. First, the ESS principals, Kenya and R. Byron Whitaker will testify how Liberty did not perform on its obligations under the agreement and how the software ESS was required to use actually hampered its business efforts rather than promoted them. They will also testify regarding their efforts to raise the stature and visibility of Liberty's business in the North Texas market through the Hunt Sports Group and how Liberty undermined ESS's business by allowing *another* Liberty franchisee to prepare *free* returns in ESS's designated area. Certainly the Whitakers would be inconvenienced by having to litigate these issues in Virginia rather than in the action already on file in Texas.

40. Moreover, those third party witnesses who substantiate the Whitaker's defenses, as well as their affirmative claims against Liberty, are located in Texas.

41. Ryan Gipson, John Alper, and John Waggoner reside in the Northern District of Texas and were present at the meeting involving Liberty and the Hunt Sports Group where the Liberty representatives shamed and embarrassed the ESS principals in attendance, and were witnesses to the comment by John Hewitt that the Hunt Sports Group audience "was not his target market" and that Liberty's money 'was made off of the poor."

42. Johnny Washington, the franchisee whom Liberty allowed to prepare free returns in ESS's designated area is located in the Northern District of Texas.

43. Diana West and Teressa Raiford, ESS tax preparers who will testify about the significant problems experienced with the new LibTax software and the repeated need to seek technical support from Liberty – and how it was slow or not forthcoming – reside in the Northern District of Texas.

44. Audie Medrano and LaTonya Berry, ESS tax preparers who were present when Liberty's agent, Geoff Knapp, made his hostile and unprofessional visits to ESS and threatened Ms.

Whitaker, demanding she immediately show him all ESS's files or the Liberty franchise agreement would be terminated. Likewise Kirby Brown, the ESS customer who witnesses Knapp's tirade and asked if Ms. Whitaker was all right after he left, resides in the Northern District of Texas.

45. And finally, Margaretta Farmer resides in the Northern District of Texas and will testify Liberty directly interfered with ESS's business by contacting her and telling her that at she should not do business with the ESS principal, R. Byron Whitaker, or his office.

46. Thus, the great majority of those witnesses with unique testimony to give – as opposed to a Liberty corporate representative who will simply talk about its documents and agreements – are located in the Northern District of Texas. Accordingly, transfer would benefit witness convenience and access, and not even shift the inconvenience to Liberty.

c. **Party convenience.**

47. The convenience of the parties is also a relevant consideration, for which "the logical starting point" is a consideration of their residence.[9]

48. Here, even though Virginia is the home base of Liberty, the balance of convenience factors weighs for transfer to Texas. ESS and Ms. Whitaker are located in Texas and lack the financial resources to defend the action in Virginia; while no Liberty personnel located in Virginia have any significant relevant testimony to offer and Liberty has sufficient resources to defend (and has chosen to establish franchises) across in the country.[10] Thus, transferring this action to Texas would not simply shift the balance of inconvenience on the parties.

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9 *Mullins v. Equifax Info. Servs., LLC,* No. Civ.A. 3:05CV888, 2006 WL 1214024, at *6 (E.D.Va.), quoting *U.S. Fidelity & Guaranty Corp. v. Republic Drug Co.*, 800 F.Supp. 1076, 1080 (E.D.N.Y. 1992).

10 *Cf. Precision Franchising, LLC*, 2006 WL 3840334, at *5; *Intranexus, Inc. v. Siemens Medical Solutions Health Servs. Corp*, 227 F.Supp.2d 581, 584 (E.D.Va. 2002).

d. The interest of justice.

49. The interest of justice encompasses all factors bearing on transfer that are unrelated to the other three factors, such as the pendency of a related action, the court's familiarity with the applicable law, docket conditions, access to premises that might have to be viewed, the possibility of unfair trial, the ability to join other parties, and the possibility of harassment.[11]

50. Here, the relevant interest of justice factors favor transfer. There is already a pending action in the Northern District of Texas with all relevant parties before it, unlike this one.

51. Nor is there any basis to believe a Texas federal judge could not correctly apply the Virginia law of contracts or federal trademark law. On the other hand, if there is any consideration to be given this aspect of the factor, the Texas tort actions alleged by ESS against Liberty in the Northern District case should argue for transfer based on the greater vagaries in tort law between the states.[12]

52. And there is no reason to believe that docket conditions in the Eastern District of Virginia are any better or worse than those in the Northern District of Texas.

53. Finally, access of the court to the necessary sources of witnesses to provide live rather than deposition testimony at trial, is a significant factor in assessing the interest of justice.[13] Here, none of the key witnesses are within the subpoena range of this court, while all can be brought before a Texas jury which can then directly assess their demeanor and credibility.

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11 *Precision Franchising, LLC,* 2006 WL 3840334, at *6, citing *GTE Wireless, Inc. v. Qualcomm, Inc.*, 71 F.Supp.2d 517, 519 (E.D.Va. 1999).

12 *See Bertnick v. Home Fed. Sav. & Loan Ass'n,* 337 F.Supp. 968, 971 (W.D.Va. 1972) (noting that some consideration "should ... be given to judicial familiarity with the governing laws.").

13 *See, e.g., Pharma-Craft Corp. v. F.W. Woolworth Co.*, 144 F. Supp. 298, 307-308 (M.D. Ga.1956); *Benrus Watch Co. v. Bulova Watch Co.*, 126 F. Supp. 470, 472 (D.R.I. 1954); *Axe-*

3. Finally, at a minimum this cause should be stayed pending resolution of the Northern District of Texas case.

54. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation dictates that where there are actions relating to the same subject matter and raising identical issues pending between the same parties in two judicial districts, such actions should be tried in one forum or the other – not both.[14] Since Liberty's claims can all be tried in Texas, and the Texas court is the only one with all necessary parties before it, a stay of this action in deference to the resolution of all claims in the context of the Texas action is appropriate.

PRAYER FOR RELIEF

Defendant Kenya Whitaker therefore respectfully requests that this Court transfer or stay the instant action so that the instant disputes can be resolved by the Court (1) where all claims arose, (2) where all witnesses are located, and (3) which has jurisdiction over all necessary parties – the Northern District of Texas.

Respectfully submitted,

KENYA WHITAKER, *PRO SE*

Houghton Fund A, Inc. v. Atlantic Research Corp., 227 F. Supp. 521, 523 (S.D.N.Y. 1964); *Rodgers v. Northwest Airlines Inc.*, 202 F. Supp. 309, 312 (S.D.N.Y. 1962).

14 *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952), *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2nd Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the ____ day of May, 2007 on Vanessa M. Szajnoga, Corporate Counsel, Liberty Tax Service, 1716 Corporate Landing Parkway, Virginia Beach, VA 23454 by certified mail, return receipt requested.

KENYA WHITAKER